Santa Maria El Mirador *and* Ed Gellis. Case 28–CA–16824

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 26, 2001, Administrative Law Judge Thomas Michael Patton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief. The Charging Party also filed a reply brief and a motion to correct the record.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs, and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The judge found no merit in the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by (1) promulgating an overly broad no-access rule and by (2) discharging employee Ed Gellis on October 20, 2000, because he engaged in the protected concerted activity of circulating letters to other employees for their signatures regarding wages, hours, and other terms and conditions of employment. Applying established Board precedent, we reverse the judge and find that the Respondent violated the Act as alleged in these two respects.

Background

The Respondent is a nonprofit organization that serves developmentally disabled adults in, among other facilities, nine group homes in Santa Fe, New Mexico. Four clients reside in each group home. The clients suffer from mental retardation, mental illness, and behavioral disorders. Many have multiple disorders and some clients must be prevented from engaging in self-abusive behavior, violence, and inappropriate behavior directed at staff, other residents, and members of the public.

The homes are staffed 24 hours a day, 7 days a week on rotating shifts, with one skills trainer on duty for each shift. The skills trainers work under the supervision of team managers and assistant team managers. None of the skills trainers sleep at the facilities. The skills trainers work with clients in activities such as cooking, cleaning, and personal grooming. They also accompany the clients on supervised trips to community resources such as banks, libraries, and shopping malls. Specialists visit the homes to provide necessary medical and therapy services to the clients.

Ed Gellis, the alleged discriminatee, was a skills trainer for over 6 years before he was discharged on October 20, 2000. He worked at the Respondent's Ponderosa facility from 1997 until being transferred to the Alamosa home in August 2000 where he worked until the time of his discharge. Gellis provided the same services to clients as the other skills trainers. Gellis' team manager was Roberto Rodas and the assistant team managers involved in the events leading to Gellis' discharge were Sergio Garcia and Eli Mora. Team managers reported to Program Director Anita Westbrook. Respondent's human resources director was Barbara Craft.

The Respondent has had a policy in effect at its facilities since at least 1997 concerning visits to on-duty skills trainers. The conduct and work rules section of the Respondent's human resources guidelines prohibits:

> Visits (excessive or prolonged) from relatives, friends, or off-duty staff while on duty, any behavior which prohibits the on-duty staff from discharging the duties of his/her job.

The guidelines provide that disciplinary action up to and including termination of employment may be imposed for violating the rules. Employees are required to sign an acknowledgement of having received a copy of the guidelines, and Gellis signed the acknowledgement in 1995 and 1997. Also in 1997, and again in 1998, Gellis

[1] The Charging Party moves to correct the record, arguing that on p. 4, line 31 of his decision, the judge inadvertently confused the identity of two individuals mentioned in this case. The Charging Party maintains that the judge's error makes it appear as if the individual with the initials E.C. is the same individual referred to elsewhere in the judge's decision as a pedophile. In fact, E.C. is not the individual identified as a pedophile. Accordingly, we grant the Charging Party's motion and shall correct the judge's decision as follows: on p. 4, line 31, the term, "the pedophile" should be substituted for the initials "E.C." in both places those initials appear.

[2] No exceptions were filed to the dismissal of allegations that the Respondent violated Sec. 8(a)(1) by interrogating an employee about protected concerted activities and by impliedly threatening employees with retaliation for engaging in protected concerted activities.

[3] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

signed a form entitled, "Santa Maria El Mirador Dismissal Acknowledgement," which reads in relevant part:

> I understand that the following behaviors are grounds for immediate dismissal. They include, but are not limited to,
>
> * * *
>
> Having visitors (relatives/friends/off duty staff) while on duty . . . .

In late August 2000, Gellis learned that a letter dated August 18, addressed to Program Director Westbrook, was being circulated among employees for signature. The letter discussed a number of issues concerning the working conditions of employees at the Respondent's Santa Fe group homes, including, among other things, staffing ratios, the alleged lack of support given by management to skills trainers, and the fact that new hires were paid the same wages as more senior employees. Gellis signed the letter on August 23rd, and also began circulating it.

Gellis redrafted the August 18 letter, dated it September 7, 2000, and began circulating it along with the letter of August 18th. The new draft was also addressed to Westbrook and also concerned working conditions, but emphasized the alleged lack of open communication between staff and management and the alleged fear the staff felt in speaking out in instances where they disagreed with management's directives. Gellis was the first employee to sign the new draft on September 12th. Gellis also solicited signatures on his letter from approximately 30 employees.

On September 20, 2000, while he was off duty, Gellis went to the Respondent's Del Sur group home where he met for 10 to 15 minutes with fellow employee Eddie Martinez,[4] who had just completed his shift. Gellis and Martinez discussed the letters Gellis was circulating. Gellis and Martinez were observed in conversation by lead skills trainer Bernadette Romero,[5] but she could not hear what they were saying. The judge credited Romero's testimony that Gellis and Martinez spoke for several minutes inside the house but exited when Assistant Team Manager Mark Geraghty drove up. Geraghty encountered the two as they were exiting the house.

In a memo dated that same day, addressed to Assistant Team Manager Sergio Garcia with copies to Team Manager Rodas, Program Director Westbrook, and Human Resources Director Craft, Gellis informed the Respondent that he had been circulating two documents that addressed "some serious problems" that the direct care staff was facing. The memo also informed the Respondent that Gellis had written one of the documents and was circulating both documents, but that both the writing and circulating were done on his own time, when he was not on duty.

On September 25, 2000, Geraghty sent a memo to Westbrook, reporting on a conversation he had with Skills Trainer Eddie Martinez outside the Del Sur group home on September 20. Geraghty's memo stated that he saw an unusual number of cars parked in front of the Del Sur home on September 20th, and he stopped to find out why. As he was entering, the memo continued, Martinez and Gellis were leaving. The memo stated that Geraghty found this odd because neither employee worked at Del Sur, but that Martinez explained to him that he and Gellis had met there so that Martinez could give Gellis directions to the Acequia group home because Gellis did not know where it was located.

Sometime in September, prior to the 27th, Gellis had a conversation at the Alamosa group home where he was working with Assistant Team Managers Sergio Garcia and Eli Mora as they were inspecting the home during Gellis' shift. Gellis advised the men of the concerns of the direct care staff and told them that if things did not improve, the staff was talking about the possibility of "getting a union."

On September 25th and again on September 26th, Gellis left different memos with Craft concerning other matters. In response to these memos, Craft called Gellis on September 27th, but the conversation soon evolved into a discussion of the letters concerning terms and conditions of employment that Gellis had been circulating for employees' signatures.

Craft prepared a personal memorandum after the phone call summarizing her conversation with Gellis. According to Craft's memo, Gellis opened the topic of the letters and the employees' concerns, to which Craft replied that she was glad he brought up the topic of the letters because she was always available to talk to employees about their problems. Craft's memo stated that she asked Gellis if she could get a copy of the letters and assured Gellis that there would be "no retribution." Craft told Gellis that his letters were bad for morale, created a negative atmosphere and were a detriment to all involved. She said the only way to deal with the problems addressed in the letters was to sit down with her face to face and address the situations. Craft's memo continued

> I also reminded Ed that he violated [the Respondent's] policy by going to Del Sur to discuss the letters with

[4] Martinez usually worked at the Acequia group home, but had worked a shift that day at the Del Sur group home.

[5] The lead skills trainer position is nonsupervisory. However, Romero, who testified for the Respondent at the trial, was promoted to the supervisory position of assistant team leader 4 days after Gellis was discharged.

> employees. I told him that this kind of activity could not take place on [the Respondent's] property.

After Craft spoke with Gellis on September 27, she spoke with Rodas, Gellis' team leader. Towards the end of the discussion, Rodas stated that he wanted to terminate Gellis. Craft suggested that they consult with Westbrook, Rodas' supervisor, before taking any action. Westbrook was on vacation at the time and was scheduled to return on October 2.

Within a week or two of her return from vacation, Westbrook met with Craft and Rodas to discuss Gellis' possible discharge. Rodas recommended that Gellis be terminated, and Craft did not oppose the recommendation. Westbrook agreed with Rodas that Gellis should be terminated based primarily on his September 20th visit to Del Sur. Westbrook stated that because of Gellis' tenure with the Respondent, he should have been well aware of its policy against visiting group homes, that it was time to "just end it all," and that she wanted to terminate Gellis' employment with the Respondent.

Prior to discharging Gellis, Craft consulted counsel and prepared Cobra insurance information for Westbrook to present to Gellis. On October 20, 2000, about 6:30 a.m., approximately 1/2 hour before the end of Gellis' shift, Westbrook and Rodas arrived without notice at the Alamosa home where Gellis was working, and discharged Gellis by presenting him with a letter of termination that gave no reasons for his discharge. The letter stated that if Gellis went on the Respondent's property for any reason other than picking up his paycheck, it would be considered a trespass and Gellis would be prosecuted.

Based on the foregoing, the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1). The allegations are based on the following incidents:

> Craft's September 27th statement to Gellis, as memorialized in her personal memo of that same date, that it was a violation of the Respondent's policy to go to Del Sur [a group home] to discuss letters about working conditions with employees and her statement to Gellis that []"this kind of activity could not take place on the [Respondent's] property."
>
> Respondent's October 20th discharge of employee Gellis because he went to the Del Sur group home on September 20th to discuss the letters about working conditions with employee Ed Martinez while both employees were off duty.

As stated above, the judge recommended dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by promulgating an overly broad no-access rule and by discharging employee Ed Gellis on October 20, 2000. Both the General Counsel and the Charging Party have excepted to these dismissals. For the reasons set forth below, we reverse the judge's decision and find that the Respondent violated Section 8(a)(1) in both respects.

ANALYSIS

1. The no-access rule

The judge, citing *Tri-County Medical Center*, 222 NLRB 1089 (1976), stated that in order for an employer's rule restricting access of off-duty employees to its premises to be valid, the rule must:

> Limit[] access solely with respect to the interior of the plant and other working areas; (2) [be] clearly disseminated to all employees; and (3) appl[y] to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

The judge acknowledged that the burden was on the Respondent to prove that its rule limiting access of off-duty employees met the *Tri-County* standard.

The judge concluded that, when viewed in context, Craft did not promulgate a new rule and that the Respondent's existing rule applied only in working areas. The judge reiterated that the wording of the "Dismissal Acknowledgement" previously signed by Gellis in 1997 and 1998, prohibited on-duty employees from having off-duty employees as visitors. The judge stated that the purpose of the no-access rule was to keep off-duty employees out of the group homes so that the on-duty skills trainer could be constantly monitoring the residents. The judge found that [] Craft's statement to Gellis on September 27th that he "violated [the Respondent's] policy by going to Del Sur to discuss the letters with employees" and "that this kind of activity could not take place on [the Respondent's] property" did not establish that "a new rule was announced that would have any effect on off-duty employees in non-work areas."[6] The judge, therefore, recommended that this complaint allegation be dismissed. We disagree.

The complaint does not challenge the legality of the Respondent's written no-access rule, which dates back to 1997, and is set forth in its human resources guidelines

[6] The judge, however, made no finding as to whether Gellis and Martinez were in a work area during their September 20th meeting at the Del Sur facility.

and its dismissal acknowledgement form. Therefore, for purposes of our analysis, we will assume that that rule is valid.

However, the complaint does allege that in September 2000, the Respondent promulgated an unlawful no-access rule. We agree that Craft committed this violation by her September 27th statements to Gellis, as memorialized in Craft's accompanying memo on that date, that Gellis "violated [the Respondent's] policy by going to Del Sur to discuss the letters with employees" and that "this kind of activity could not take place on [the Respondent's] property." Unlike the judge, Chairman Battista and Member Schaumber find no need to apply the principles of *Tri-County Medical Center*, supra, to find that Craft's statements and memo were unlawful. Craft's newly promulgated rule was expressly aimed at "going to Del Sur to discuss the letters with employees." Thus, the rule was not a general one involving access to other facilities but rather was specifically aimed at employees engaging in Section 7 activities at other facilities. In addition, the rule effectively prohibited "this kind of activity," on *any* of Respondent's properties. For these reasons, contrary to the judge, Chairman Battista and Member Schaumber find that on September 27th, the Respondent, through Craft, promulgated and maintained an unlawful no-access rule in violation of Section 8(a)(1) of the Act.[7]

2. The Respondent's discharge of Gellis

The judge analyzed Gellis' discharge under *Wright Line*.[8] The judge found that Gellis was engaged in activity protected by Section 7 of the Act when he circulated the letters among his fellow employees for them to sign, and that the Respondent was aware that Gellis was engaged in that activity. However, having found that Craft did not promulgate an unlawful expansion of the Respondent's valid no-access rule, and that Gellis violated that rule when he visited Martinez at Del Sur, the judge concluded that Gellis was engaged in unprotected conduct and that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Gellis for violating its no-access policy. For the following reasons, we disagree with the judge.

The judge found that the primary justification for discharging Gellis was his violation of the no-access rule stated by Craft on September 27 by meeting with Martinez at the Del Sur facility.

We have found this rule to be unlawful. The Respondent admits that the violation of the rule, i.e., Gellis' meeting with Martinez at Del Sur, was the "final straw" in the discharge of Gellis. Phrased differently, the Respondent admits that the meeting was the reason for the discharge of Gellis. Accordingly, the discharge was unlawful.

In the alternative, even if the General Counsel has shown that the meeting was *a* reason for the discharge, the Respondent has failed to show that there were other (lawful) reasons which, by themselves, would have caused the discharge. See *Wright Line*, supra. Under this analysis, the General Counsel would have satisfied the initial burden of proof. The burden then shifts to the Respondent to show that there were other reasons that would have caused the discharge even if there were no protected activity. The Respondent has failed to meet that burden. In this regard, the Respondent points to a number of incidents to show there were lawful reasons for Gellis' discharge such as: failure to watch a patient while on duty; failure to notice that the facility's refrigerator was broken resulting in spoiled food; and refusal to distribute certain medications to patients. However, as the General Counsel points out, the Respondent had previously disciplined Gellis for these incidents and, in one instance, rescinded the discipline. In any event, all of the incidents occurred months prior to Gellis' discharge and there is no evidence that the Respondent cited any of these reasons at the time of Gellis' discharge. By contrast, as noted above, the record is replete with evidence that the Respondent relied on Gellis' distribution of letters and his violation of the Respondent's unlawful no-access rule as the reasons for his discharge. Thus, we find that the Respondent has not met its burden of showing that it would have discharged Gellis in the absence of his protected concerted activity.

[7] In agreeing with his colleagues that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining an unlawful no-access rule, Member Walsh applies the well-established principles of *Tri-County Medical Center*, supra. First, the newly promulgated rule did not limit access of off-duty employees solely to the interior of the group homes. Rather, it was a blanket prohibition on access to the Respondent's property, and thus it included the driveways, parking spaces, and other nonclient, nonwork areas. Second, the rule was not clearly disseminated to all employees. Third, Craft's newly promulgated rule specifically prohibited what Craft called "this kind of activity." Because the "activity" Gellis and Craft were discussing in that September 27th conversation was the distribution and solicitation of signatures on letters concerning employees' terms and conditions of employment, it is clear that the newly promulgated rule was being applied to protected concerted activity particularly and not necessarily to other activities by off-duty employees. Finally, the Respondent offered no sufficient business justification for denying off-duty employees access to the outside, nonworking areas of the group homes such as the driveways and parking areas. For these reasons, contrary to the judge and in agreement with his colleagues, Member Walsh finds that on September 27th, the Respondent, through Craft, promulgated and maintained an unlawful no-access rule in violation of Sec. 8(a)(1) of the Act.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

Accordingly, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by terminating employee Ed Gellis because he engaged in protected concerted activities.

CONCLUSIONS OF LAW

1. By promulgating an overly broad no-access rule on September 27, 2000, the Respondent violated Section 8(a)(1) of the Act.
2. By discharging employee Ed Gellis on October 20, 2000, because he engaged in the protected concerted activity of circulating letters to other employees regarding wages, hours, and other terms and conditions of employment, the Respondent violated Section 8(a)(1) of the Act.
3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. The Respondent has not otherwise engaged in any unfair labor practices.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

Specifically, the Respondent shall rescind its unlawful no-access rule promulgated by Human Resources Director Barbara Craft on September 27, 2000, and notify the affected employees that this has been done. The Respondent shall also remove from its files any reference to Ed Gellis' unlawful discharge and notify Gellis that this has been done and that the discharge will not be used against him in any way. Further, the Respondent shall offer Ed Gellis immediate and full reinstatement to his former position in the Santa Fe area or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired since the date of his dismissal. The Respondent shall also make Ed Gellis whole for any loss of earnings and other benefits suffered by reason of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Santa Maria El Mirador, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and enforcing an overly broad no-access rule.

(b) Discharging its employee Ed Gellis or any other employee because that employee has engaged in protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-access rule promulgated on September 27, 2000 denying employees access to exterior and nonworking areas of its nine group home facilities in the Santa Fe, New Mexico area while off duty and notify the affected employees that this has been done.

(b) Within 14 days from the date of this Order, offer Ed Gellis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(c) Make Ed Gellis whole for the loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Within 14 days of the date of this Order, remove from its files all reference to Ed Gellis' unlawful discharge, and within 3 days thereafter notify Gellis in writing that this has been done and that evidence of this unlawful discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its nine group home facilities in the Santa Fe, New Mexico area, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any of its nine group homes in the Santa Fe, New Mexico area at any time since September 27, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 30, 2003

_____
Robert J. Battista, Chairman

_____
Peter C. Schaumber, Member

_____
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain, or enforce an overly broad no-access rule.

WE WILL NOT discharge employee Ed Gellis or any other employee for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind the no-access rule promulgated on September 27, 2000 denying employees access to exterior and nonworking areas of our nine group home facilities in the Santa Fe, New Mexico area while off duty and WE WILL notify the affected employees that this has been done.

WE WILL, within 14 days from the date of the Board's Order, offer Ed Gellis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Ed Gellis whole for the loss of earnings and other benefits he suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files all reference to Ed Gellis' unlawful discharge and WE WILL, within 3 days thereafter, notify Gellis in writing that this has been done and that evidence of this unlawful discharge will not be used against him in any way.

SANTA MARIA EL MIRADOR

Lew Harris, Attorney, for the General Counsel.
Michael T. Pottow, Attorney (Catron, Catron and Sawtell, P.A.), for the Respondent.
Ed Gellis, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS MICHAEL PATTON, Administrative Law Judge. This case was heard at Santa Fe, New Mexico, on May 30 and 31, 2001. Ed Gellis filed the charge on October 23, 2000. The charge alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by Santa Maria El Mirador[1] (the Employer or Respondent). The complaint issued on December 22, 2000.

The complaint alleges that the Employer violated Section 8(a)(1) of the Act by discharging Gellis on October 20, 2000,[2] because he engaged in the protected concerted activity of circulating letters to other employees regarding wages and hours and other terms and conditions of employment. The complaint also alleges that the Employer violated Section 8(a)(1) on September 19, and October 3, by promulgating an overly broad no-access rule and that the Employer's human resources director impliedly threatened Gellis with retaliation for engaging in

[1] Sometimes abbreviated SMEM.
[2] Unless otherwise indicated, all dates are in 2000.

concerted activities and coercively interrogated Gellis about employees' concerted activities.[3] The answer denies any violation of the Act.

The following findings are based upon the entire record, including the posthearing briefs filed by the General Counsel and the Employer. Many of the facts are not in dispute. In assessing credibility testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits facts showing that it meets the Board's jurisdiction standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Employer is a nonprofit organization serving developmentally disabled adults. Its operations in Santa Fe, New Mexico, include nine group homes. Four residents, also called participants or clients, live in each home. The homes are staffed 24 hours a day on rotating shifts. Typically there is one staff person present for each shift. That employee's title is skills trainer. The skills trainers do not sleep at the homes.

Ed Gellis was a skills trainer for over 6 years before he was discharged on October 20. The skills trainers work under the supervision of team managers and assistant team managers. Gellis' team manager was Roberto Rodas. Assistant Team Managers Sergio Garcia and Eli Mora were assistant team managers who were involved in events relevant to Gellis' discharge. Bernadette Romero was a lead skills trainer (a nonsupervisory position) who was made an assistant team manager in October. The team managers reported to Program Director Anita Westbrook. Registered Nurse Estella Trujillo was in charge of medical services that are provided by her and other nurses. The Employer's human resources director was Barbara O. Craft and the Employer's executive director was Mark Johnson.

The evidence consists of testimony by Gellis, Rodas, Romero, Westbrook, Trujillo, Craft, and Johnson, as well as documentary evidence. The documentary evidence includes a Board affidavit given by Rodas during the administrative investigation of the charge. That affidavit consists of a statement of 7 pages, plus 30 pages of attached documents. This affidavit was received as a stipulated exhibit. Rodas was called as a witness by the General Counsel and was subject to cross-examination regarding the affidavit, including the attachments. Since I was afforded an opportunity to observe Rodas testify, I am in a position to determine whether testimony by witnesses at the hearing was more reliable than Rodas' affidavit and its attachments or vice versa. Neither the Employer nor the General Counsel has contended that the affidavit and its attachments should not be treated as affirmative evidence. As a stipulated exhibit the affidavit is affirmative evidence in the particular circumstances of this case. See *Alvin J. Bart*, 236 NLRB 242 (1978). Cf. *Eugene Iovine, Inc.*, 328 NLRB 294 fn. 5 (1999).

With one exception, I find that the appearance, contents, substance, internal patterns and other distinctive characteristics of the documents attached to the Rodas affidavit, taken in conjunction with the circumstances, establish that they are documents taken from the Employer's business records, that they are what they purport to be and are, like the statement to which they are attached, affirmative evidence. The exception is the attachment numbered 070, which purports to be a list summarizing disciplinary actions taken against Gellis. That document has not been considered in reaching my decision.

Santa Maria hired Gellis in 1994. Beginning in the summer of 1997, Gellis was assigned to the Ponderosa group home and in August 2000, he was transferred to the Alamosa group home where he was working at the time of his discharge. In the month prior to his discharge he, together with the other employees, received a cost of living raise, bringing his salary at the time of his discharge to $18,564. At the time he received the cost of living raise he received a letter thanking him for his "day to day hard work." The salutation of the letter is "Dear Gellis, Edward J:" and is obviously a form letter that Craft credibly testified was sent to all skills trainers using a word processor merge program at the time all employees received their cost of living raise. At the time of his discharge Gellis was also receiving on the job training to be an architectural draftsman by an unrelated employer. He was working as a draftsman at the time of the hearing.

Johnson, Craft, and Rodas credibly testified regarding the operation of the group homes, the needs of the residents, the responsibilities of the skills trainers and the rules governing their job performance.

The skills trainers work with residents in activities such as cooking, cleaning, personal grooming, and other areas of everyday normal living. Medical and therapy specialists visit the homes to provide medical and specialized professional services. The skills trainers accompany residents of the group homes on supervised trips to community resources such as banks, grocery stores, shopping malls, theaters, and public libraries. An objective is to provide a normal home atmosphere for the residents.

The residents suffer from mental retardation, mental illness, and behavioral disorders. Many have multiple disabilities. Some residents must be controlled to prevent self-abusive behavior, as well as violence and inappropriate behavior directed at other residents, staff, and members of the public. Some residents have eating disorders and must be monitored to prevent them from eating harmful nonfood substances. As an intermediate care facility for the mentally retarded, the Employer is subject to Federal standards and regulations. The focus of those regulations is to insure 24 hours a day intervention and

[3] Complaint paragraphs 5(a)(1) and 5(a)(2) also allege independent violations of Sec. 8(a)(1) by Bernadette Romero. No evidence was offered to establish those allegations. The Employer's unopposed motion to dismiss those allegations at the close of the General Counsel's case in chief was granted. The complaint does not allege any violation of Sec. 8(a)(3).

support that is individualized to each resident. Because of the nature of the residents' disabilities and their vulnerability, they must be constantly monitored and supervised around the clock.

On February 3, employee Sara Kelly made a detailed written report to management that she had observed Gellis failing to properly supervise a resident for an extended period of time during a visit to a public library that evening. Gellis had accompanied the residents of his house on a visit to the library. One of the residents Gellis was responsible for was a pedophile.[4] Constant line-of-sight monitoring of the pedophile had been mandated whenever he was in public places like the library. Kelly's written report stated that she observed Gellis working intently at a computer terminal and not monitoring the residents. She reported that she recognized the voice of the pedophile in another part of the library, located him and spent the next 15 minutes monitoring him. Kelly reported that she confronted Gellis at the library about this issue and that she later telephoned the on-call Assistant Team Leader Kate McLaine at her home and reported the incident. McLaine's on-call log for that evening shows that she tried to reach Gellis at the home where he was working later that night. The log shows that after several unsuccessful attempts Gellis answered at 8:12 p.m. McLaine identified herself and Gellis either hung up or they were cut off. She had the same result at 8:35 p.m. when she called again. In a third call 10 minutes later the phone was answered by an answering machine and she left a message for Gellis that she was the on-call person and that she needed to talk to him. The log does not reflect that Gellis returned the call.

Rodas gave Gellis a written warning on February 8 for not adequately supervising residents at the library on February 3. The warning was signed by Westbrook, Craft, and Rodas and threatens possible termination. The warning states that Sara Kelly observed Gellis working at an internet computer and not supervising residents for at least 30 minutes. Gellis' made extensive written comments on the warning protesting that Kelly's report was the result of a personal issue between him and Kelly and requested mediation. On February 11, 14, and 18, Gellis sent memos to Rodas, Westbrook, and Craft challenging the discipline and how it had been handled. In none of his written comments did Gellis challenge the factual assertions in the written warning. On February 22, there was a meeting of Gellis, Rodas, and Craft. At the meeting Gellis asserted that he had kept the pedophile in his vision at all times and denied that the resident had not been left unsupervised. Craft credibly described Gellis' behavior at this meeting. Despite Craft's assurances that everyone would have a turn to talk, he continued to interrupt Craft and Rodas, speaking in a very loud and verbally aggressive manner, to the point that Craft was concerned that Gellis might become physically violent.

On February 28, Craft advised Gellis by memorandum that the discipline had been rescinded. Craft credibly testified that she and Rodas jointly concluded to not discipline Gellis only because it was one employee's word against another and that under the Employer's dispute resolution procedures the action would likely be rescinded.

[4] The actual name of the person appears in the record.

At a staff meeting at the Ponderosa home sometime after the library events, Program Director Anita Westbrook was present when Rodas mentioned the pedophile and remarked that he needed constant supervision. Gellis spoke up and said he thought that Rodas comments were directed at him. Gellis then argued that close supervision of the pedophile was not necessary. He told Westbrook and the other staff members that he had not seen any behavior by the pedophile that warranted one-on-one supervision or that the pedophile needed to be kept away from children. Gellis observed that he had brought his own children around the man and that he paid no attention to Gellis' children. Westbrook replied to Gellis that they had a professional opinion that the pedophile was a risk and that if something happened the resident would probably go to jail and his life would be ruined.

On March 15, Gellis came on shift at 11 p.m. The skills trainer he was relieving told him that the light was out in the refrigerator. Gellis assumed that the problem was merely a burned out light bulb and took no action. In fact, the refrigerator was not working. Gellis did not recognize the problem until the following morning when he began preparing for breakfast and he found melting ice cream. Gellis did not call the on-call supervisor. Instead, he awaited the arrival of the skills trainer for the next shift, identified as Chriselda, and told her of the situation. Chriselda then called the on-call supervisor. Gellis testified that he and Chriselda threw out all the food in the refrigerator. The value of the lost food was $400 to $500. When Westbrook learned of the situation she was concerned about the loss of so much food and questioned whether all the food needed to be discarded. She went to the home and examined the garbage to see if any of the discarded food could be salvaged. She found that there was no meat in the discarded food despite the fact that based on grocery receipts and the menu, meat would have been in the refrigerator. Chriselda told her that Gellis had taken the meat. Gellis testified that he did not take the meat. Westbrook's testimony regarding what she was told by Chriselda is credited, but the evidence is insufficient to prove that Gellis took the meat. I draw no adverse inference against either the Employer or the General Counsel for failing to call Chriselda as a witness.

In a March 16 memo to Brian Rempel, the manager of human relations at the time, Rodas described meeting with Gellis and of counseling him about not using the call system and reviewing the procedures Gellis should follow when appliances are not working properly. Rodas reported expressing his concern that none of the food in the malfunctioning refrigerator had been salvaged. Gellis conceded that Rodas met with him regarding the refrigerator incident and did not deny that Rodas pointed out that if Rodas realized the refrigerator was not working it might have been possible to save some food and to have cooked some of the food.

When Gellis worked at Ponderosa one of his duties was passing prescribed drugs to residents. Gellis was a certified medication aide (CMA). Estella Trujillo was a registered nurse responsible for overseeing health care of the residents and she supervised the nursing staff. She oversaw Gellis' CMA work. Gellis was able to pass drugs to residents under the authority of Trujillo's nursing license. Thus, Trujillo was personally re-

sponsible as a registered nurse for Gellis' CMA work. On July 31, Trujillo relieved Gellis of his duties related to administering medication. She credibly testified that she took this action because she suspected he was discarding medication he opposed administering to a client identified as E.C. There was an objective basis for Trujillo's suspicion. Another staff member had reported to Trujillo that a medicine tablet had been found in a toilet at the end of one of Gellis shifts. Based upon a description of the tablet by the staff member, Trujillo concluded that the appearance of the tablet was consistent with it being risperdal, a psychotropic drug that was being administered to E.C.

E.C.'s psychiatrist had prescribed risperdal and the nursing staff monitored the patient. Before the tablet had been found in the toilet Gellis had challenged the decision of the psychiatrist to administer risperdal to E.C. Gellis' opposition giving E.C. risperdal was the subject of a staff meeting, where he made a formal presentation in support of his position. Gellis' recommendation that E.C. be taken off risperdal was not adopted.

Because of behavior problems that had been observed with E.C., Trujillo suspected that Gellis was withholding E.C.'s risperdal. The locks on the medication cabinets at the Ponderosa home where were changed at the time Gellis was relieved of his CMA duties. After nurses began administering E.C.'s drugs, a reduction in his aggressive and violent behavior was observed. Trujillo attributed the improvement in E.C.'s behavior to his being given his medication.

Gellis called Trujillo several times and asked why he was not allowed to pass medication, but Trujillo never fully explained her reasons to Gellis. She told Gellis she wanted to monitor the residents and since nurses were scheduled anyway, she wanted the nurses to assess the residents' response to their medications. Trujillo was generally opposed to CMAs passing drugs.

Rodas determined that E.C. would be transferred from Pondersoa to another home to separate him from Gellis. The record does not show that Gellis was told the reason for the proposed transfer. Gellis was strongly opposed to the transfer, and on August 6, wrote a detailed memo opposing the transfer to Lynn Shannon, QMRP (Qualified Mental Retardation Professional), with copies to Rodas, Trujillo, Kelly, and Westbrook. In this memo Gellis again challenged the medical decision to give E.C. psychotropic medication and questioned other aspects of his treatment. The memo requested that the team reconvene to reconsider E.C.'s transfer. While Gellis' opposition to the transfer was being considered, another person occupied the vacant slot and E.C. could not be transferred. Rodas then decided to transfer Gellis from Ponderosa to another group home to accomplish his objective of separating Gellis and E.C.

Rodas gave Gellis a memo on August 10, advising him that he would be transferred to the Nizhoni group home effective August 24. Nizhoni was a new group home. Rodas' memo said that the reason for the transfer was that Gellis' skills were needed at the new site because of his experience and dependability. Rodas testified that Gellis was experienced and dependable, but his credible testimony and the record show that his actual agenda, which he did not state to Gellis, was to separate Gellis from resident E.C. The memo advised Gellis that his special scheduling needs that permitted him to work his second job would be unchanged, but that his schedule was subject to change to meet the Employer's needs. A copy of the Employer's written policy reserving the right to reassign employees and the Employer's policy on work schedules was attached to the memo.

Rodas and Gellis offered inconsistent versions of aspects of a discussion that they had regarding the August 10 memo, and Rodas' decision to transfer Gellis to Nizhoni. Rodas testified that during the discussion Gellis spoke to him in a very loud and abrasive voice, that Gellis said that the decision to transfer him was "bullshit," that Rodas needed to take management classes and that Rodas didn't know what he was doing. Gellis denied that he made those remarks to Rodas. Gellis testified that he restricted his remarks to pointing out that he had expressed his opposition to men serving as a skills trainer for female residents because it was inconsistent with proper respect for the female residents' dignity. Rodas' testimony regarding the portions of the conversation denied by Gellis was more credibly offered. Moreover, Gellis impressed me as being a very intelligent and perceptive man. It is probable that he recognized Rodas' real agenda was to separate him from E.C. It is not improbable that he reacted in an angry and aggressive fashion, given the evidence of his strong personal interest in E.C.'s care and the credible evidence that on other occasions he spoke to members of management in a loud and abrasive manner. In any case, based upon considerations of demeanor, I credit Rodas' testimony regarding the content and character of Gellis' remarks to him described above.

On August 13, Gellis submitted a memo to Rodas regarding his transfer to Nizhoni, with copies to Craft, Westbrook, and the Nizhoni team manager. The memo stated in some detail the reasons he challenged the appropriateness of the Employer's policy of using male skills trainers to work with female residents. The memo pointed out that he had requested in writing that he not be required to help female residents who needed help in dressing, bathing, using the bathroom or feminine hygiene and asserted that his wishes had been accommodated in the past. This was a reference to an incident in 1998, when Gellis had refused to accept an assignment to work with female residents.

On July 16, 1998, Gellis had sent a memo to management that explained that he had refused to work a shift as requested by an on-call supervisor because he did not wish to work with female residents. On July 23, 1998 Shari Mott, then Gellis' team manager, responded by memo. Mott rejected Gellis' contention that he should not be required to work with females and informed Gellis that his conduct had been insubordinate. Mott cautioned him that insubordination was grounds for dismissal. Nevertheless, Gellis was not thereafter assigned to work with female residents until Rodas announced his transfer to Nizhoni.

On August 15, Rodas responded by memo to Gellis' August 13 memo opposing his transfer to Nizhoni. Rodas observed that Gellis' preference to not work with female residents had been accommodated in the past only because there were sufficient female skills trainers. Rodas went on to state that it was no longer possible to accommodate Gellis because of the limitations of the available staff and the need to have a male staff member with his experience, knowledge, and reliability at Nizhoni. Rodas included a copy of Rodas' job description.

Rodas did, however, offer Gellis an alternative to working at Nizhoni. Rodas stated that he was willing to transfer another experienced staff member from the Alamosa group home to Nizhoni and allow Gellis to work at Alamosa. Rodas pointed out that while there was one female resident at Alamosa, she was completely independent with hygiene and grooming. Rodas asked for Gellis' response by August 18.

Gellis did not respond until August 20, when he submitted a memo to Rodas with copies to Craft and Westbrook. In the memo Gellis did not indicate whether he would prefer to work at Alamosa, rather than Nizhoni. Instead, the memo challenged Rodas' characterization of Gellis' opposition to working with female residents as "personal issues" and questioned the wisdom of transferring Gellis from Ponderosa. Gellis claimed that the decision to have nurses administer medication to Ponderosa residents was evidence of instability at Ponderosa. As discussed earlier, that decision was actually motivated by a suspicion that Gellis was withholding resident E.C.'s drugs, with resultant aggressive and violent behavior by that resident. Gellis attached to his memo statements from two employees who worked at Ponderosa. Kim Polston, who had apparently resigned her employment, signed one. Polston acknowledged that she felt guilt for the distress her leaving Ponderosa had caused residents. Lynda Garcia signed the other employee letter, which predicted dire consequences to residents if Gellis left Ponderosa. Credible testimony by Program Director Westbrook shows that while the transfer was being considered Garcia visited Westbrook and complained that Gellis had pressured her to write the letter. Garcia did not testify.

Notwithstanding his efforts to avoid transfer, Gellis was transferred to the Alamosa group home later in August. After he was transferred he asked Trujillo for permission to pass medications at Alamosa. Trujillo refused the request. She credibly testified that in addition to her general professional doubts regarding the passing of medications by CMAs, she was especially concerned about Gellis passing medications at Alamosa because of her suspicion that Gellis had withheld medication at Ponderosa. Garcia's particular concern was that one of the Alamosa residents was on psychotropic medication for aggression and that the resident was resistant and noncompliant in taking his medications.

In August Gellis had learned that a letter dated August 18 addressed to Westbrook, was being circulated among employees for signature. The letter discusses a number of issues concerning working conditions at the Respondent's Santa Fe group homes. Gellis' name is the 12th signature of 30 persons who signed that petition. Dates by the employees' names suggest that Gellis signed the letter on August 23, and that the last employee signed the letter on September 22. Unlike the other employees who signed the letter, Gellis also printed his name. Gellis testified that he later began circulating the letter. The date of the earliest signature he recalled observed being placed on the document has a date of August 31 beside it.

Gellis testified that he also redrafted the August 18 letter and circulated the new draft, which was dated September 7. The second letter was also addressed to Westbrook and addressed working conditions. The first signature on that document appears to be that of Gellis and is dated September 12. The next name has the date of September 14 by it, and the last signature is dated September 24. It appears that persons who had signed the first letter also signed the second and at least one name appears to have been placed on both letters on September 22.

On September 18, Gellis sent Trujillo a memorandum raising questions about his not being permitted to pass medications and stating that he had received information that another skills trainer had been asked if he would like to train for CMA certification.

On September 20, while Gellis was off duty, he went to the Employer's Del Sur group home, where he met with employee Eddie Martinez. Gellis and Martinez discussed the letters Gellis was circulating. Bernadette Romero was working at Del Sur the morning of September 20 when Gellis met with Martinez. The two letters circulated by Gellis indicate that Romero had signed the letters on September 19. Romero testified as a witness for the Employer and described what she observed at Del Sur that morning. On September 20 she was a lead skills trainer. She was promoted to assistant team leader in October. The Employer's attorney represented that she was promoted 4 days after Gellis was discharged. According to Romero Martinez was in the house when she arrived to begin work at Del Sur at about 7 a.m. on September 20.

Romero testified that Gellis came into the house about 15 minutes later and told Romero that he was there to meet Martinez. Romero recalled that Martinez's shift should have been over when Gellis arrived, but that he may have stayed to do required paperwork. It appears probable that Martinez was off work at the time he met with Gellis. Martinez was assigned to the Acequia[5] group home and it was Romero's understanding that Martinez had worked at Del Sur on the shift before her arrival that day. Romero testified that Gellis met with Martinez inside the house for about 10 or 15 minutes, but that she did not overhear what they said. Romero testified that while Gellis and Martinez were talking inside the house Assistant Team Manager Mark Geraghty[6] drove up. Geraghty's arrival in front of the house could be observed through large windows on the front of the house. Romero testified that upon Geraghty's arrival, Gellis and Martinez ended their conversation inside the house and left the house through the front door as Geraghty was walking up the sidewalk. Romero testified that she saw Geraghty speaking with Gellis and Martinez outside the house. Geraghty then came into the house and asked what Martinez and Gellis were doing there. Romero explained to Geraghty that Gellis was there to meet Martinez because Gellis did not know where Acequia was located.

Gellis testified before Romero and offered a different version of the September 20 events. Gellis did not mention in his testimony that he talked with Martinez inside the house. Gellis merely testified that he and Martinez were walking to their cars at Del Sur when Geraghty drove up and called out to Martinez. Gellis testified that Geraghty called Martinez over to speak to him and that Gellis continued on to his car, but then decided to walk back to hear what Geraghty had to say. Gellis testified

[5] The spelling of Acequia in the record has been corrected.

[6] The spelling of Geraghty's name in the record has been corrected.

that he heard Geraghty tell Martinez about a meeting that he hoped to see him at later that day.

Considering the demeanor of the witnesses and the probabilities, I credit the testimony of Romero regarding what she testified that she observed at Del Sur on September 20. Gellis did not merely meet with Martinez outside Del Sur as his testimony suggests. I specifically credit Romero's testimony that the two employees met inside the house and I do not credit Gellis' testimony that he and Martinez and were walking to their cars when Geraghty drove up. Rather, they exited the house after Geraghty drove up. Moreover, I do not find that Gellis testimony is sufficient to establish that Geraghty spoke to Martinez only about a meeting because he did not claim to hear all that was said before he returned to listen.

In a memo dated September 20, addressed to Assistant Team Manager Sergio Garcia, with copies to Team Manager Rodas, Program Director Westbrook, and Human Resources Director Craft, Gellis informed the Employer that he was engaged in circulating two documents, "which address some serious problems that direct care staff are facing." Gellis stated in the memo that he had written one of the documents and was circulating the documents to employees on his own time, when he was not on duty. The General Counsel does not contend and the evidence does not show that the Employer had any knowledge of the letters or of Gellis' circulation of the letters earlier than September 20. Based upon the probabilities and an absence of any evidence to the contrary, I conclude that the September 20 memo was delivered to the Employer after Geraghty discovered Gellis meeting with Martinez in the Del Sur group home at about 7:15 a.m. that morning.

The Employer has had a policy since at least 1997, that on-duty skills trainers are not to have visits from friends, relatives, or off-duty staff. The conduct and work rules section of the Employer's human resources guidelines prohibits:

> Visits (excessive and/or prolonged) from relatives, friends, or off-duty staff while on duty, any behavior which prohibits the on-duty staff from discharging the duties of his/her job.

The guidelines provide that disciplinary action up to and including termination of employment may be imposed for violating the rules. Employees are required to sign an acknowledgement of having received a copy of the guidelines. Gellis signed an acknowledgement of having received a copy of the guidelines in 1995 and 1997.

In 1997 and again in 1998, Gellis signed a form entitled "Santa Maria El Mirador Dismissal Acknowledgement," each of which reads in relevant part:

> I understand that the following behaviors are grounds for immediate dismissal. They include, but are not limited to,
>
> . . . .
>
> Having visitors (relatives/friends/off duty staff) while on duty . . . .

Prior to 1997, the Employer used a similar dismissal acknowledgement form that did not provide that having visitors was a ground for immediate dismissal. Craft credibly testified that the provision regarding visitors was added to the dismissal acknowledgement beginning in 1997 as a result of a change in policy. The record evidence demonstrates, there is no evidence to the contrary, and I find that Employer's human resources guidelines and the dismissal acknowledgement regarding having visitors was communicated to the Employer's employees, including Gellis, and was in effect beginning in 1997.

The General Counsel contends that there was an accepted practice of off-duty employees visiting the group homes for special events like birthdays, or just for everyday social reasons. The evidence supporting this contention is the following testimony by Gellis:

> Q. Were there occasions when off duty employees from other group homes visited where you were employed?
> A. Yes, sir.
> Q. And what would occasion those visits?
> A. Different things. I worked with a fellow who often stopped by just to say hello. Again, a client—I remember a client was sick and a direct care staff stopped by to see him. Sometimes, there was no particular reason to stop by, somebody was just in the neighborhood.
> Q. Did—was there any prohibition brought to your attention by management that those types of visits were inappropriate?
> A. No, sir. There—there was none.
> . . .
> Q. And did you, yourself, make visits to other group homes when you were off duty?
> A. Yes, sir.
> Q. And what would occasion those visits?
> A. I think, if I was working—if I was working at Ponderosa House, the home that I was working at—again, if I was in the neighborhood, I would stop by to say hello. And—and eventually it became—I stopped by for these letters, I contacted staff.

The General Counsel examined Rodas regarding the question of social visits to a group home by off-duty employees who worked at a different home. A fair reading of Rodas' testimony is that visits by skills trainers to a home where they did not work was only acceptable, if the skills trainer was accompanying a resident. Rodas testified as follows:[7]

> Q. There's no rule against relatives coming to visit and participate with their group home relatives in events that are taking place in the homes; is that right?
> A. That's right. They can come any time.
> Q. They can come any time?
> A. Yes.
> Q. Okay. Now the skills trainers that are on a shift at a group home, do they have specified hours for meals and breaks?
> A. No, they don't.
> Q. Okay. And sometimes in these celebrations or special events, staff from one house may come to the house where the celebration is taking place; isn't that true?
> A. That's true. With the clients you mean?
> Q. Yes.
> A. Okay.

[7] The notations in brackets regarding the interruptions of the testimony are added.

Q. Yes.
A. Yes, that's true.
Q. No, what I'm saying is—well, you have Ponderosa House, that is the name of one house; is that correct?
A. That's correct, yes.
Q. When you have someone celebrating a birthday in Ponderosa House, a participant, and someone who is working in Mejone (phon.) House knows that person, there's no prohibition for that employee, the skills trainer from Mejone House to come and participate in the birthday celebration and have some birthday cake, is there?
A. If they're with the clients. You mean if they're working with the clients and come over to Ponderosa House for supper?
Q. No, if they just come because they had—they were familiar with the participant who was having a special supper, a special dinner, or a birthday, and because they had worked there before, is there any prohibition for them to come over and visit and partake of that event?
A. If they come with a client, if they're on duty, I don't see why—then it's not prohibition for—
Q. [interrupting the witness] No. They're not—I don't think you're understanding my question.
A. I'm sorry.
Q. My question is, if they are not on duty, but they are like a friend or a relative of the participant in Ponderosa House, there's no prohibition of a friend or a relative coming to celebrate a birthday or have a special meal, is there?
A. Not for a relative. We have a policy in place for the staff members who are off duty to be—
Q. [interrupting the witness] I'm not—well, all right. I said friend or relative. Is there prohibition for a friend or relative—
A. No.

The record evidence does not demonstrate that management was aware of social visits by off-duty employees as described by Gellis. Gellis' testimony on regarding social visiting by skills trainers lacks detail and is uncorroborated. Gellis' testimony suggests that the Employer condoned social as well as professional relationships between staff and residents. The record evidence does not warrant such a conclusion.

I find that the evidence does not establish that the Employer condoned visits to the group homes by off-duty employees, whether to visit residents or other staff members. Craft credibly testified that a lead skills trainer named Sandy Esell resigned to avoid termination without any prior verbal or written warnings because she had her children visiting at a group home while she was working. During the same week that happened Esell also overspent a food purchase order that also had missing items. Westbrook credibly described from memory several instances during her tenure when the Employer had corrected employees regarding visits to group homes. One of the instances involved an off-duty skills trainer visiting a group home. Westbrook recalled that it occurred in early 2000, and was brought to the attention of management when a resident complained of the visiting off-duty employee.

Geraghty sent a memo to Westbrook on September 25, with copies to Craft and Rubi Lucero, Geraghty's supervisor, reporting a conversation with Martinez outside Del Sur on September 20. The memo states that there were six cars parked in front of the house and he had stopped to see what was going on. The memo indicates that as he was walking in Gellis and Martinez were leaving. The memo states that Geraghty thought it unusual because neither employee worked there. Geraghty reported that he spoke with Martinez outside the house and asked Martinez what was going on and that Martinez explained that Gellis had asked to meet him there because Gellis did not know where Acequia was located. Gellis was not asked to clarify the question of where Martinez worked before they met and neither Geraghty nor Martinez was a witness. The record is insufficient to draw any conclusions regarding the inconsistency between Geraghty's memo and Romero's understanding that Martinez worked at Del Sur on September 20.

Gellis' uncontroverted testimony was that sometime in September, prior to a September 27 telephone conversation with Craft, Assistant Team Managers Sergio Garcia and Eli Mora conducted an inspection of the Alamosa group home while Gellis was on duty. In a conversation with Garcia and Mora, Gellis advised them of concerns of the direct care staff with an asserted lack of support by management and a lack of communication with management. Gellis told Garcia and Mora that the staff was talking about possibly getting a union if things didn't change. The evidence does not establish, and the General Counsel does not argue, that Gellis' remarks were the result of questioning by Garcia or Mora. Rather, the evidence is that Gellis volunteered the information.

Gellis left a memo with Craft on September 25, protesting the lack of a response from Trujillo to his September 18 memo to her and contending that he was being treated unfairly by not being permitted to pass medications. On September 26 Gellis left another memo with Craft, with a copy to Trujillo, stating that he had spoken with Trujillo and wished to proceed to a complaint under the Employer's dispute procedures regarding his not being permitted to pass medication. Gellis also tried to reach Craft by phone. When he was unsuccessful, he left a message asking her to call him at his other job.

On September 27, Craft called Gellis at his other job. This call was in response to Gellis' September 26 memo, and he requested the call in his telephone message. Gellis and Craft testified as to what was said. In addition to her testimony, a memorandum prepared by Craft summarizing the conversation was admitted into evidence. As described by both Gellis and Craft the conversation lasted about 20 minutes.

The conversation initially was about Gellis being relieved of his CMA duties and how the passing of medications was going to be handled. There are inconsistencies between Craft and Gellis regarding the discussion of the CMA issue, but their resolution is not necessary to resolve the unfair labor practices allegations or to resolve other credibility issues. Nevertheless, to the extent the evidence regarding the CMA issue is inconsistent, I credit the testimony and memorandum of Craft over the less convincing testimony of Gellis. I draw no adverse conclusions from the fact the one page memo did not mention some

aspects of the conversation that Craft addressed in her testimony.

After discussing the CMA issue, the discussion turned to the letters addressed to Westbrook that Gellis was circulating and which had been the subject of Gellis' September 20 memorandum to Westbrook, Craft, and others. According to Gellis, Craft told him that she had received the memo in which he informed the Respondent that he was circulating letters and she wanted to know what the letters were about. Gellis testified that he told Craft that the staff felt that it was not being rewarded for seniority, that new hires being paid the same as long time employees, that the staff felt that it didn't have a voice, and that there was an us versus them mentality on both sides. Gellis testified that Craft said that the letters were causing more problems and increasing divisiveness between direct care staff and management, that she had been approached by some of the staff who told her that they had felt pressured to sign and that there was a concern that those who signed would treat those who didn't differently. According to Gellis, Craft said that anyone from the staff with a problem could come to her in utmost confidentiality. Gellis further testified that Craft requested the letters, but that he expressed concern for the protection of employees, since employees were afraid to express complaints to management and that Craft said that he could give the letters to her without the signatures.

Craft's testimony was that Gellis opened a discussion of management problems and he introduced the topic of letters that he and others employees had put together that addressed employee concerns and that he mentioned problems with team managers and assistant managers. According to Craft, she said that she was glad he mentioned the letters because she wanted to make herself available to any employee that has problems with managers to sit down and work out some solutions. According to Craft, Gellis started talking a lot and talking very quickly and very loudly. She described Gellis as speaking very passionately about how poorly he thought the managers functioned in their job, saying that employees were unhappy, they didn't feel like they had a voice with their managers and that employees felt that the communication went one way and that employees were not invited to participate in decision making. Craft testified that she could not "get a word in edgewise" and that she spent 10–15 minutes just listening. Craft testified that eventually she was able to speak and that she asked if she could get a copy of the letters in order to address the issues and Gellis expressed concern that the employees might be fearful if he did that. Craft testified that she responded that she would respect the confidentiality and that he could trust her with the letters and that she assured him that there would be no retribution. Craft's September 27 memo adds (consistent with Gellis' testimony) that Craft suggested furnishing copies of the letters without the names. Craft's memo also states that she was receiving reports that employees felt coerced through peer pressure to sign the letters, that the letters were bad for morale, they created a negative atmosphere and were a detriment. The accounts of Craft and Gellis regarding discussion of the letters are in many respects consistent. To the extent they are inconsistent, I find the version described by Craft to be more probable and to have been more credibly offered. In particular, I credit the account of Craft that Gellis opened the discussion of the letters.

Craft's September 27 memo states, "I also reminded Ed that he violated [the Employer's] policy by going to Del Sur to discuss the letters with employees. I told him that this kind of activity could not take place on SMEM property."

In contrast to Craft's memo, Gellis testified as follows:

> Q. Then what was said in the conversation, if anything?
> A. She said that a staff member had—not a staff member, a supervisor had seen me at another house and—with the letters—and had—and she told me that that wasn't allowed. That was a violation of the policy, and I asked her if I could meet with staff, not inside the house, but outside the house on the curb, or beyond the curb right by the street—if I could meet them before or after work at the houses and she told me that I couldn't do that. That anywhere near the property was a violation of the policy. And then she reiterated the fact that we could come to her in utmost confidentiality and I told her that I would do what I can to get her a copy of the letters and that's—right now that's all I remember of the conversation.

Neither the Employer nor the General Counsel chose to expand on or clarify this evidence. Craft's memo is limited to a statement of the substance of what she said to Gellis regarding his visit to Del Sur. The record demonstrates that Gellis was both highly verbal and not at all reluctant to speak up. It is probable that Gellis would have responded to Craft when she criticized his visit to Del Sur. Accordingly, I conclude that it is probable that both addressed the issue of Gellis making off-duty visits to group homes.

Gellis' testimony was a summary of what he claims was said, rather that his recollection of what was actually spoken. Gellis' quoted testimony was delivered as a rapid stream of run-on sentences with little inflection. Gellis testimony regarding the conversation was unconvincing. I specifically do not credit his claim that Craft prohibited solicitation "anywhere near" the property. I reach these conclusions even though not specifically denied by Craft. See *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79 (9th Cir. 1953), affd. 346 U.S. 482 (1953). In addition to Gellis' unconvincing demeanor there are objective reasons to question this testimony.

On October 2 Gellis sent a memo to Craft that addressed Craft's September 27 request that she be permitted to see the letters. The lengthy memo expresses Gellis' concern that the letters should not be turned over without Gellis speaking to the employees. In the memo Gellis requested permission to contact staff "at or on SMEM property" to discuss furnishing the letters to Craft. Gellis goes on to request permission "to contact staff at or on SMEM property with anything that concerns the performance of our jobs." It seems improbable that Gellis' would not have challenged an attempt to limit what employees would be permitted to do off-premises on nonwork time. In all his other memoranda, as well as in his personal contacts with management, Gellis demonstrated that he was very assertive and not hesitant to challenge management. Yet in the October 2 memo he does not suggest that Craft had presumed in their September 27 telephone conversation to tell Gellis what he or

other employees could do on their own time, off the Employer's property.

Another consideration is that Gellis' testimony regarding what occurred outside Del Sur discussed earlier, was misleading and in part not true. The content and tenor of that testimony was misleading and did not disclose the true facts regarding an event that is central to the case. Had Romero (who had supported Gellis by signing both letters) not credibly testified in rebuttal that Gellis met with Martinez in the house, the testimony of Gellis would have left the false impression that he met with Romero outside the house. Gellis did not controvert Romero's credible account. Gellis testimony regarding his visit to Del Sur is a reason for careful scrutiny of his other testimony.

A final consideration is the complaint, which is based upon Gellis' charge and the evidence supporting the charge. The factual portion of the pertinent complaint allegation is limited to an assertion that that the Employer's rule "prohibited access for off-duty employees to any part of the Respondent's facilities."

Words have meanings in the context in which they are used. The September 27 conversation regarding Gellis' visit to Del Sur and the October 3 message by Craft in answer to Gellis' questions regarding future visits to group homes must be considered in the context of what had occurred on September 20, as well as the established rules regarding visitors at the group homes of which Gellis was aware. Craft was not announcing a new rule restricting visits by off-duty employees. The issue that was addressed by Craft was Gellis' participation in a meeting in the living area of Del Sur. The message that Craft delivered to Gellis was that the meeting between Gellis and Martinez in the living area of Del Sur violated the Employer's existing rules and that no exceptions would be made for him.[8]

On October 1 Trujillo had responded to the September 18 memo Gellis had sent to her regarding his not being permitted to pass medications. Trujillo confirmed that she was phasing out the use of CMAs, but that she might choose to train some individuals as CMAs for backup. On October 2, without notice to Gellis and based upon the medication issue involving E.C., Trujillo filed a complaint against Gellis with the New Mexico Board of Nursing. Trujillo's testimony regarding her decision to file the complaint is rational and was credibly offered. There has been no contention that the complaint to the Board of Nursing was motivated by Gellis' protected activities and there is no substantial evidence warranting such a conclusion.

Craft and Gellis agree that on October 3 Craft left a message on Gellis' answering machine. The message was contained on a cassette tape. The tape was available during the administrative investigation, but the tape was never requested and Gellis furnished to the investigator only a written transcript that he had prepared and which he testified was accurate. Gellis testified that he had been instructed to keep the tape and to bring the tape to the hearing. Gellis testified that the tape had been accidentally recorded over earlier on the same day that he testified. The Employer objected to the receipt of the transcript in lieu of the original tape. I sustained the objection on the ground that the absence of the original had not been satisfactorily explained. Gellis then testified regarding the substance of Craft's October 3 telephone message and Craft thereafter acknowledged that the transcript contained the gist of what was said. The transcript was then received as an exhibit to the extent that it had been adopted by Craft. The credible testimony establishes that Craft left a message on Gellis' answering machine on October 3 acknowledging receipt of Gellis' October 2 memo and his request to continue to contact staff at or on SMEM property. She told Gellis that the answer was no, that it violated the Employer's policy and that he could not continue to do that. She also said that employees could visit with her in confidence. Craft's October 3 memo, like her September 27 remarks, must be considered in context. It is significant that Craft stressed that Gellis could not "continue to do that," an unambiguous message that he was prohibited from making off-duty visits like the one he had made to Del Sur on September 20 because it violated the Employer's policy.

Craft testified that after she spoke with Gellis on September 27 she went to Rodas and told him that Gellis had asked to again be an exception to policy. She testified that this was a reference to Gellis having previously asked to be an exception to two other policies. One was a policy that prohibits employees from working back-to-back 8-hour shifts and the other was Gellis' request to not work with female residents. Craft testified that Rodas indicated that because of this additional request to be exempted from restrictions on visiting group homes, he wanted to terminate Gellis. Craft testified that Rodas had been frustrated in trying to manage Gellis and that there had been issues around Gellis' performance in the past. Craft testified that she suggested that they consult with Westbrook, Rodas' supervisor, who was then on vacation.

Westbrook was on vacation beginning September 21 and returned on October 2. After she returned Craft and Rodas met with her and the decision to discharge Gellis was made. The date of the meeting was not established. Craft recalled it being the first or second week of October.

Westbrook testified that she agreed to discharge Gellis based upon several incidents. Regarding Gellis' visit to Del Sur she testified that the information she had received regarding Gellis' visit to Del Sur on September 25 was "the final straw." She stated that because of his tenure he knew that "hanging out" at a group home was not allowed. She testified, "I felt like as long as he had been there that he knew that, and so my response was, just end it all, I'm tired of this, and do the termination." Westbrook explained that a number of earlier problems involving Gellis, discussed in detail supra, contributed to her support of Rodas' recommendation to discharge Gellis. These included the refrigerator incident, the pedophile incident and the related series of memos by Gellis, the issue of withholding medication and the related resident behavior problems, Gellis' resistance to moving a resident, his resistance to being reassigned, and his resistance to working with female residents. Westbrook denied that the nature of the letters Gellis circulated was a consideration in his discharge.

[8] The General Counsel has not urged a finding that impermissible restrictions were imposed on solicitation at Employer property other than at the group homes. The focus of the restrictions at issue was limited to the group homes and any broader applicability of the restrictions was not litigated.

In his testimony under FRE 611(c) and in his affidavit Rodas pointed to the same incidents as Westbrook. He testified, "During that period of time, he was insubordinate with his supervisors. He refused all of kind of directives that would come from his supervisors, and it was a series of events that led to the conclusion of Mr. Gellis' termination." Rodas agreed that in his communications with Gellis he had never used the word insubordinate. He was asked to point out in his affidavit the acts of Gellis he considered to be insubordinate. One example Rodas pointed out was Gellis' opposition to moving a resident, discussed supra. Another example was Gellis' opposition to his transfer from Ponderosa and rude and insulting remarks Gellis made to Rodas. On that occasion Gellis spoke to him in a very loud and abrasive voice, saying said that the decision to transfer him was "bullshit," that Rodas needed to take management classes and that Rodas didn't know what he was doing. The examination of Rodas' questioning was then cut short without Rodas having completed going through the affidavit to point out other examples of insubordinate conduct. Instead, the affidavit was received as a stipulated exhibit.

Craft testified that if she disagreed with a manager regarding a termination, higher management decided the issue. She testified that she did not oppose Rodas' wish to fire Gellis' because of the two unpleasant experiences she had in dealing with Gellis. Craft cited the conversation she had at the meeting in February regarding the pedophile incident that she described as extremely loud, verbally aggressive, disrespectful, and insubordinate and her telephone conversation on September 27, which was similarly unpleasant.

Craft credibly testified that the Employer uses progressive discipline in some cases and not others, depending on the circumstances. An example presented of a discharge where progressive discipline was not used involved the discharge of skills trainer Sandy Esell, discussed above, who was terminated in without any prior verbal or written warnings. Another example of a discharge without progressive discipline was the discharge of a nurse for arguing with the health service coordinator in front of others and making derogatory comments about the health service coordinator. Westbrook described two instances where the Employer took corrective action short of discharge when off-duty employees were visiting group homes. In one situation an off-duty employee and her children were visiting a home and another situation where an off-duty employee was visiting an on-duty friend.

Craft delayed Gellis' discharge until after she consulted counsel and prepared Cobra insurance information. On October 20 Gellis was working at Alamosa and was due to finish his shift at 7 a.m. About 1/2 hour before the end of the shift, Rodas and Westbrook arrived without notice and discharged Gellis. They gave Gellis a letter of termination that did not explicate the reasons for his discharge. The letter stated in substance that if he went on the Employer's property for any reason other than picking up his paycheck at the administrative offices it would be considered trespass and that he would be prosecuted. Rodas and Westbrook instructed Gellis to gather his things and leave, which he did.

On October 25 the New Mexico Board of Nursing advised Gellis that although there was evidence for the Board to consider disciplinary action against him based on Trujillo's report, the Board had determined to not initiate disciplinary proceedings. The Board of Nursing cautioned Gellis of serious consequences that could result from violating the applicable statutes and rules of the Nursing Board. The record does not reflect that Gellis has sought to use his CMA certification since the Employer fired him.

B. Analysis

The Employer acknowledges in its post-hearing brief, consistent with well-established precedent, that asking employees to sign letters like those circulated by Gellis is activity protected by Section 7 of the Act. The Employer concedes and the evidence clearly establishes that at the time the decision was made to discharge Gellis the Employer knew that Gellis was engaged in asking his fellow employees to sign the letters. Gellis testified without contradiction that he also told two supervisors in September that employees were considering a union.

As framed by the allegations of the complaint, the legal issues to be decided are (1) whether Craft's statement of the Employer's policy to Gellis in their telephone conversation on September 27, and in her telephone message to Gellis on October 3 unlawfully restricted access to any part of the Employer's facilities by off-duty employees; (2) whether Craft unlawfully questioned Gellis about employees' concerted activities in the September 27 telephone conversation; (3) whether in the September 27 telephone conversation Craft make implied threats of retaliation against employees for their protected concerted activities, and; (4) whether the Employer violated the Act by discharging Gellis because employees engaged in protected concerted activities.[9]

The General Counsel and the Employer filed post-hearing briefs in support of their positions. Each points to the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), as the controlling precedent regarding restricting the access of off-duty employees to the Employer's premises. In *Tri-County* the Board stated the following test:

> We conclude, in order to effectuate the policies of the Act, that such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.[10] Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

The burden is on an employer to prove that a rule limiting access of off-duty employees rule meets the Tri-County standards. The initial issue here is whether Craft promulgated a no-access rule on September 27 that was not limited to non-

[9] There were no motions to amend the complaint and no arguments have been advanced that the evidence establishes violations of the Act not specifically alleged in the complaint. The evidence does not establish any violations not alleged that were fully litigated.

[10] The Tri-County rationale would be equally applicable to protected concerted activity not involving a union.

working areas and reaffirmed the rule on October 2. I conclude that when viewed in context, the record shows that Craft did not promulgate a new rule and that the existing rule she cited applied only in working areas.

On September 27 and October 3, Craft told Gellis, in substance, that when he met with Martinez in the Del Sur group home on September 20 the Employer's rule governing visitors in the homes had been violated. The wording of the "Dismissal Acknowledgement" signed by Gellis in 1997 and 1998, prohibits on-duty employees from having off-duty employees as visitors. If an off-duty employee is visiting with an on-duty employee, the visit is necessarily in a work area because the entire shift is worktime. The skills trainers work alone and must constantly monitor the residents. The object of the rule is to not have off-duty employees in the house. While the purpose of Gellis' visit on September 20 was to meet with Martinez, he was a visitor when they met in the living room of the house.

When Craft told Gellis that "this kind of activity" could not take place on the Employer's property it was in the context of a discussion of visitors in the group homes like his visit to Del Sur on September 20. The evidence does not show that a new rule was announced that would have any effect on off-duty employees in nonwork areas, assuming there are any nonwork areas at the group homes.

The meaning of Gellis' request to meet with employees "at or on SMEM property" in his October 2 memo is unclear. Craft's application of the existing rule to prohibit visits like that of Gellis on September 20 is not unreasonable and her application of the rule did not amount to the promulgation of a new rule. If there was any ambiguity in her September 27 remarks, the message was made clear on October 3 when Craft left her message for Gellis. She explained that what was prohibited was Gellis "continuing to do that," a reference that could only be to his visit in the Del Sur house. The policy Gellis violated was disseminated to all employees and the focus was not on union or protected concerted activity.

In view of the foregoing, I conclude that the rule as stated by Craft on September 27 and October 3 was not the promulgation of an unlawful restriction and I shall recommend that complaint paragraphs 5(b)(2) and 5(c) be dismissed.

The next issue is whether Craft unlawfully questioned Gellis on September 27. In *Rossmore House*, 269 NLRB 1176 (1984), the Board held that the lawfulness of questioning by employer agents about protected activities turned on the question of whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. There is no per se rule or presumption that makes Craft's questions unlawful. Here Gellis asked Craft to call him and when she did he opened a discussion of the letters and the concerns of the employees. The subject of employee morale was introduced by Gellis. The letters themselves were addressed to Westbrook and it is clear from the most cursory examination of the letters that those who signed had to have expected the letters to be given to the Employer. When Gellis expressed concern for giving Craft copies of the letters she suggested redacting employee names. When he declined to furnish the letters she acquiesced. The tone of Craft's remarks was not coercive, despite Gellis' unpleasantness. There is an absence of evidence that threats or promises of benefits accompanied Craft's remarks. I shall recommend dismissal of complaint paragraph 5(b)(3).

The complaint alleges in paragraph 5(b)(1) that in the September 27 conversation Craft "impliedly" threatened employees with retaliation for engaging in concerted activities. No explanation of the theory of this alleged violation or the facts on which it is based has been offered and the alleged violation is not self-evident. Accordingly, I shall recommend dismissal of complaint paragraph 5(b)(1).

The final issue is whether the discharge of Gellis violated Section 8(a)(1). The General Counsel and the Employer agree that the issue should be resolved using the analytical framework established by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

To set forth a violation in dual motive Section 8(a)(1) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Line*, id. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994); *Andrex Industries Corporation*, 328 NLRB 1279 (1999).

If the General Counsel's initial burden is satisfied, the employer can escape liability for its action by either disproving one or more of the critical elements of the General Counsel's case or by establishing as an affirmative defense that the employer would have taken the same action even in the absence of the employee's protected conduct. *TNT Skypak, Inc.*, 312 NLRB 1009, 1010 (1993). To make such a showing, an employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Signature Flight Support*, 333 NLRB 1250 (2001).

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the employer's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Nevertheless, the employer's stated reasons for adverse action against an employee can be considered as a part of the General Counsel's initial burden and if they are pretextual they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse action was motivated by protected activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the

employer for its action and any additional reasons offered at the hearing. *Williams Contracting*, 309 NLRB 433 (1992).

The uncontroverted evidence shows that Gellis engaged in protected concerted activity by drafting the second letter and asking fellow employees to sign the letter and that the Employer became aware of his activity when he sent his September 20 letter to the Employer. In addition, in September Gellis told two supervisors that the employees were considering getting a Union.

The General Counsel points to circumstantial evidence to show that protected conduct was the motive for Gellis discharge. It is contended that Gellis was treated more harshly that some employees who were not fired for receiving visitors. This argument is not convincing. Lead Skills Trainer Sandy Esell was terminated without any prior verbal or written warnings because she had visitors while on-duty, where there were also other problems with her performance. The record demonstrates that Rodas viewed Gellis as a problem employee before the protected activity. These problems included evidence that Gellis may have withheld medication and not supervised a pedophile in a public library, as well as the refrigerator incident. Moreover, the insubordinate and personally insulting remarks Gellis made to Rodas regarding Gellis' transfer show Rodas had ample motive unrelated to protected activity to recommend discharge.

The General Counsel argues that the evidence shows that the Employer manufactured an overblown concern and reaction to the visit that Gellis made to Del Sur, contending that there is no evidence that Romero was prevented from discharging her job, because both Gellis and Martinez were off-duty. This argument is not persuasive. The thrust of the Employer's rule was to prohibit absolutely no off-duty staff visits in the group homes.

Rodas' August 10 memo to Gellis remarking on Gellis' knowledge, dependability, and experience is stressed as evidence of improper motive. This evidence is not persuasive. The credible evidence shows that the transfer was to separate Gellis from a resident who Rodas believed was being deprived of his prescribed medication by Gellis. Gellis had successfully foiled Rodas' earlier attempt to transfer the resident to separate him from Gellis. The memo was not a reflection of any high regard Rodas had for Gellis and given the background are not inconsistent with Rodas' decision to fire Gellis. The problems that the Employer relied on in explaining Gellis' discharge were not related to deficiencies in his knowledge, dependability, and experience.

No reason was given to Gellis for the discharge at the time he was given the discharge letter. It is argued that an inference of unlawful motive can nevertheless be drawn from the language of the letter because it contains a warning of prosecution for trespassing by merely going on the Respondent's property. It is not uncommon for employers to bar former employees from their property and the Employer had a valid rule prohibiting on-duty employees from receiving visitors at the group homes. Under these circumstances, I am unable to conclude that the discharge letter is evidence of an improper motive for Gellis' discharge.

Gellis was discharged close in time to his protected activity because the event that precipitated his discharge was unprotected conduct in the course of his otherwise protected activity. Timing in these circumstances is insufficient, standing alone, to make out a prima facie showing that the protected activity was a substantial or motivating reason for the discharge.

In view of the foregoing, I conclude that the General Counsel has not shown that protected concerted activity was a substantial or motivating reason for Gellis' discharge. Accordingly, I shall recommend dismissal of paragraph 4(d) of the complaint.

CONCLUSIONS OF LAW

1. Santa Maria El Mirador is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, San Francisco, California September 26, 2001

SANTA MARIA EL MIRADOR

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.